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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 178

JAMES ORVILLE COUCHOIS,
Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

OSMOND K. FRAENKEL,
Counsel for Petitioner.

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IN THE

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No.

JAMES ORVILLE COUCHOIS,

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, James Orville Couchois, respectfully represents and petitions for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit as follows:

Summary Statement

Petitioner seeks review of the judgment of the United States Circuit Court of Appeals for the Fifth Circuit affirming the judgment of the District Court for the Southern District of Alabama sentencing defendant to a term of imprisonment for five years following a verdict of guilty found by a jury (R. 25) of the crime of attempting to interfere with the armed forces of the United States

in violation of §33, Title 50 of the United States Code Annotated.

The prosecution was based on certain oral statements alleged to have been made by petitioner. Petitioner denied having made any of these statements and contended, moreover, that the statements were not sufficient to justify conviction. Because petitioner's assigned trial counsel failed to move for a directed verdict the sufficiency of the evidence is probably not open to review in this Court. Therefore the only basis on which this petition is sought is the failure adequately to provide petitioner with [redacted] representation by counsel.

The facts are as follows: Petitioner was a merchant seaman whose permanent home was in Detroit, Michigan (R. 62, 64). He was a member of the crew of the steamship "West Nohno" which had been on a nine-month voyage (R. 42). Shortly after this vessel arrived in Mobile, Alabama, in February, 1943, petitioner was arraigned before a United States Commissioner charged with having brought obscene literature into the United States and was then taken before the Steamboat Inspection Agency to answer why his seaman's papers should not be revoked (R. 11). At that hearing testimony was given by certain members of the crew and of the naval gunners crew assigned to the vessel concerning statements attributed to petitioner (R. 11, 12). The Steamboat Inspection Agency then revoked his papers (R. 12). About a month later petitioner was taken before the United States Commissioner and charged with sedition (R. 12). In the meantime the crew of the vessel had been paid off (R. 12). During all this period petitioner had been in jail and had not been represented by counsel (R. 11, 12).

After petitioner was released on bail he communicated in Mobile with an attorney who represented his union, and then went to New York in a further effort to induce the union to take charge of his case (R. 13). Petitioner was under the impression that the union would furnish him with an attorney (R. 13, 14).

The trial was first set for some time in July (the exact date is not given in the record—R. 15). In the meantime petitioner had made various efforts to have his witnesses subpoenaed. The members of the crew had, of course, scattered after having been paid off. Petitioner corresponded with the District Attorney and the District Judge on the subject and gave a list of the witnesses to certain agents of the Federal Bureau of Investigation, who offered their services to help locate witnesses (R. 14, 15). However, petitioner was informed that the witnesses could not be subpoenaed at governmental expense because they were more than 100 miles distant from the place of trial (R. 13, 15). The case was then continued until August 2, 1943 (R. 15).

Some time after the first adjournment petitioner received a letter from the District Attorney confirming this trial date and stating that if petitioner was not ready he should write the judge. This petitioner did. He received an answer that the request for continuance could not be granted as it had been received too late (R. 16).

When the case was called on the morning of August 2, 1943, petitioner was without a lawyer (R. 16). The Court at about 11 o'clock appointed Mr. Samuel W. Pipes III to represent petitioner (R. 16, 32). Petitioner had never seen Mr. Pipes prior to this appointment (R. 16). Mr. Pipes immediately asked for an adjournment to give him time to confer with petitioner, to prepare the case and to obtain the attendance of witnesses (R. 18, 32). The Court refused to do this, but recessed from 12 o'clock until 2.30 (R. 19, 32). The trial began in the afternoon of the 2nd and lasted until the afternoon of the 6th (R. 19). The Court was in session between 9.30 in the morning and 5, sometimes 6 o'clock at night (R. 19).

After the judgment of conviction petitioner made a motion for a new trial on the ground, among other things, that he had not been properly represented by counsel (R. 10). This motion was supported by his own affidavit (R. 11-17) and that of Mr. Pipes (R. 18-21). No affidavits in

opposition were filed. The motion was denied in the District Court without the writing of any opinion (R. 24). In the Circuit Court of Appeals an opinion was written by Judge Hutcheson (R. 92 ff.).

The Opinion Below

The opinion below has not yet been officially reported. Judge Hutcheson stressed the fact that the trial had not begun until nearly six months after the indictment and that no showing had been made at the trial of the names of witnesses desired or as to what could be proved by them. He said that under such circumstances an adjournment would not have been required had petitioner been represented by counsel of his own choosing; he could see no difference because counsel had been chosen by the Court. He said that to reach a different conclusion would be to require the suspension of the rules governing the orderly administration of justice whenever a defendant required the Court to appoint counsel for him.

Jurisdiction

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code, as amended, 43 Stat. 938, 28 U. S. C. A., §347(a). The judgment of the Circuit Court of Appeals was entered on April 22, 1944. Timely application for rehearing was made, which was denied on May 23, 1944.

Question Presented

1. Whether the provision of the Sixth Amendment guaranteeing counsel in all criminal trials has been complied with where the Court appoints counsel previously unknown

to defendant and without experience in the particular class of case involved, denies a request by counsel for an adjournment to enable counsel to familiarize himself with the case and forces an immediate trial.

Reasons Relied On for the Allowance of the Writ

The Circuit Court of Appeals has decided an important question of Federal law and constitutional law at variance with previous decisions of this Court and decisions of State courts of last resort. The Circuit Court of Appeals in its approach to the problem has dealt with the case as though it were one which arose in a State court where the only criterion to be applied is whether due process has been afforded the defendant. This is apparent from the Court's reliance on *Avery* v. *Alabama*, 308 U. S. 444. No mention is made of *Glasser* v. *United States*, 315 U. S. 60, where this Court held that the provisions of the Sixth Amendment had not been complied with where the same lawyer was appointed to represent conflicting interests and refused to speculate on what the result of the trial might have been had there been proper representation. The correct rule is laid down in *People* v. *McLaughlin*, 291 N. Y. 480.

Wherefore, petitioner prays that a writ of certiorari issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and of all proceedings had therein, and that the order of the United States Circuit Court of Appeals affirming the judgment of conviction in this case may be reversed, and that

petitioner have such other and further relief in the premises as this Court may deem proper.

Dated, June 15, 1944.

OSMOND K. FRAENKEL,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

OSMOND K. FRAENKEL,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No.

JAMES ORVILLE COUCHOIS,

Petitioner,

against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jurisdiction

The facts with regard to jurisdiction are set forth in the foregoing petition.

Statement of the Case

The basic facts have been set forth in the foregoing petition. However, there are many other facts to which the Court's attention should be called. These will be discussed in connection with the argument.

SUMMARY OF ARGUMENT

POINT I

Petitioner was denied effective representation by counsel in violation of the Sixth Amendment.

In considering the sufficiency of the representation by counsel which was afforded petitioner in this case, it is necessary to have in mind certain essential facts. Petitioner was a resident of Detroit, Michigan (R. 62, 64). He was tried in Mobile, Alabama, on a charge of having committed a crime on the high seas (R. 4, 5). The trial took place in Mobile only because of the accident that the ship on which petitioner was serving put into the port of Mobile (R. 42). None of the witnesses were residents of Mobile.

Petitioner, before he became a merchant seaman, had been in the Navy (R. 62). He joined the Merchant Marine shortly after the United States entered the war (R. 64) and obtained a job in New York on the steamship "West Nohno" (R. 65). This vessel left New York in May, 1942, and returned again to the United States in February, 1943 (R. 33). It was after this return at Mobile that defendant was charged with the offense of sedition (R. 12).

The indictment charged in two counts that defendant in conversation with various members of the Navy or the crew of the vessel said that they were foolish for enlisting in the Navy, that they could have made more money otherwise, that it didn't make any difference who won the war, and that the war was between a bunch of crooks (R. 4-6). The first count of the indictment charged that these statements were made in order to cause insubordination in the armed forces (R. 4), the second count that the statements were made in order to obstruct recruiting (R. 5).

The indictment was found on March 17, 1943 (R. 6). It does not expressly appear in the record when petitioner

was arraigned or when he was released on bail. It does appear, however, that when the case was first set for trial petitioner went from Detroit to Mobile (R. 15). The case was adjourned at that time on the request of the District Attorney (R. 15).

Petitioner had in the meantime made some efforts to obtain an attorney. He communicated with Mr. Joseph Curran, the president of his union, and was informed by Mr. Curran that the union would furnish a lawyer and see that the witnesses he needed were present (R. 14). Petitioner gave the names of the witnesses to Mr. Curran (R. 14). Petitioner also conferred with the clerk of the Court and the District Attorney with regard to the subpoenaing of witnesses and was informed that the government would not bring the witnesses to Mobile because they were more than 100 miles distant (R. 13, 15). Petitioner also gave a list of his prospective witnesses to some agents of the Federal Bureau of Investigation, who offered their services to help locate the witnesses (R. 15).

When the case was finally set for August 2, 1943, petitioner wrote the Judge asking for an adjournment, and was informed that since the jury had already been called the request was too late (R. 16). Accordingly, petitioner went from his home in Detroit to Mobile and wired his union inquiring about counsel (R. 16). When the case was called petitioner was without a lawyer (R. 16, 31).

The Trial Court then appointed Mr. Samuel W. Pipes III, a gentleman whom petitioner had never seen (R. 16). Mr. Pipes filed an affidavit in support of the motion for new trial in which he stated that he arrived at court around 11 o'clock in response to a telephone call from the judge (R. 18). Being informed by petitioner that there were absent witnesses, Mr. Pipes asked the Court to grant a short continuance to enable him to confer with defendant, prepare the case and, if possible, obtain the attendance of these witnesses (R. 18, 32). The Court refused the request for adjournment but recessed from 11.30 A. M. to 2.30 P. M. (R. 32).

Mr. Pipes had never previously had any experience in sedition cases (R. 19). He was thus required to familiarize himself with the law appertaining to such cases in such brief time as he could spare while court was not in session and while he was not occupied with his other practice. The Court sat from 9.30 in the morning until 5, sometimes 6 o'clock at night (R. 19). As Mr. Pipes pointed out in his affidavit there were many things about the nature of the case which he was not able to find out except as they were developed from witnesses. Mr. Pipes also called attention to possible prejudice done to petitioner by the non-availability of two books to which some of the witnesses referred (R. 20).

An examination of the bill of exceptions leaves considerable doubt both about the guilt of defendant and the effectiveness with which his interests were protected at the trial. Much evidence appears to have been received without objection which was highly prejudicial to petitioner. This is particularly true of the testimony of Lieutenant Commander Meek (R. 42-45) and that of Lieutenant (formerly Ensign) Carter (R. 46-51). Both of these witnesses were allowed to testify with regard to their opinions. The Lieutenant Commander was permitted to make various prejudicial statements concerning petitioner, none of which had any relevance to the charges (see R. 42, 43). Carter gave the impression that petitioner was a Communist (R. 46, 47), which was not the fact (R. 57, 74), and which was also wholly irrelevant to the prosecution. It should be noted, moreover, that the statements attributed to petitioner were made on a voyage which began in 1942 (R. 33), thus long after the Communist attitude toward the war had become one of the fullest co-operation (see R. 57).

It is perfectly apparent that petitioner had aroused antagonism on board the ship because of the manner in which he acted as the deck delegate. Petitioner had objected to various activities required of the members of the crew, and also had objected to members of the naval

gun crew being taught things which petitioner thought should be done only by members of the ship's crew (R. 42, 43). To what extent these difficulties colored the testimony against petitioner and to what extent they may have influenced the jury, it is, of course, impossible to say.

The case is further complicated by the fact that petitioner claims that the various statements attributed to him were not statements made by him at all, but quotations from various books which were on board ship (R. 75, 77), books it was not possible for petitioner to produce at the trial (R. 20).

Several members of the armed guard and one member of the ship's crew testified with regard to conversations which they had at various times with defendant. Defendant's case consisted of his own testimony and a stipulation to the effect that certain members of the crew would, if present, have testified that they never heard petitioner make any of the statements he was accused of having made (R. 60, 61).

It is obvious, of course, that no such stipulation could be of much value to petitioner. No one can say what the result of the trial might have been had some of the members of the crew been present to throw light on the situation on board ship and the real reason for bringing up these charges against petitioner. It must not be forgotten that these charges were belated ones, since petitioner was originally charged merely with having brought an obscene book into the country, a charge which was never pressed (R. 11, 12).

It is significant, moreover, that petitioner was charged with sedition for casual statements made in private conversations at undefined periods on a nine months' cruise. It is inconceivable that such matter could properly form the basis of a charge of sedition within the clear and present danger rule as laid down by this Court in *Schenck* v. *United States,* 249 U. S. 47, and just reaffirmed in *Hartzel* v. *United States* (decided June 12, 1944). The record contains no indication that petitioner's assigned counsel was

cognizant of this rule or made any attempt to have it applied to the prosecution. No motion appears to have been made to dismiss at the end of the government's case or for a directed verdict at the end of the entire case (see R. 60, 85, 86). Such a motion should have been made on other grounds also.

Petitioner was charged in the first count with attempting to cause insubordination in the armed forces by statements made to various members of the gun crew (R. 4). The primary duty of that crew was, of course, to protect the ship and its personnel in case of attack. Is there any rational basis for supposing that petitioner cared so little for his own safety that he sought to dissuade these members of the gun crew from doing their duty? Is it not more likely that petitioner was just airing his opinions because he was that kind of person and that there is no basis for a contention that he intended to violate the law? At any rate such a contention should have been presented by a motion to dismiss the first count.

Moreover, there is good ground for contending that the conviction under the second count was also not justified by the evidence. This count charged an attempt to obstruct recruiting (R. 5). The statements attributed to petitioner were, with one exception (Ryan, R. 52-58), all made to persons already in the Navy (R. 33, 35, 37, 39, 40, 58). By no stretch of the imagination could they have had the effect of obstructing recruiting (see *Hartzel* v. *United States*, decided June 12, 1944). The case against petitioner under the second count rested, therefore, only on conversations with Ryan. There is nothing in his testimony (R. 53, 54) to indicate that petitioner made the remarks attributed to him in the presence of any third persons. Is it possible that a person can be convicted of attempting to obstruct recruiting because of a single private conversation? In any case a motion to dismiss should have been made to raise this point. The absence of such motion was relied on by the Circuit Court in summarily rejecting the contention that the evidence did not sustain the verdict.

The Judge's charge is not contained in the record. It is impossible, therefore, to determine whether it adequately protected petitioner's rights and what, if any, exceptions were or should have been taken to it by petitioner's assigned counsel.

The character of the record is affected by the circumstance that no court reporter attended the trial. While this fact does not appear on the face of the record, it was stated in petitioner's brief in the Circuit Court and was not challenged in any way by the government. The bill of exceptions, moreover, gives some indication that it was prepared on the basis of memory and not from stenographer's minutes (see the conflicting statements with regard to part of the evidence of the witness Ryan—R. 55).

The Circuit Court in its opinion ignored many of the details which we have recited. It treated the case very much as though petitioner's counsel had been chosen by himself, citing *Chastain* v. *United States,* 138 F. (2d) 413. We submit that the Circuit Court proceeded from a false start. Of course, if a person charged with crime has selected a lawyer and that lawyer fails properly to protect the defendant's interests and has not adequately prepared the case, the defendant cannot complain that his constitutional rights have been denied because an adjournment has been refused. Altogether different, however, is the situation where a defendant is without a lawyer.

Even if it be urged that there is any duty on the part of a person accused with crime to get a lawyer for himself, it appears here that petitioner had made various efforts to obtain such a lawyer and, until the last moment, had expected that the union, of which he was a member, would supply a lawyer.

It appears, morever, that the Circuit Court treated the case as though the only question were whether or not the trial had been a fair one, citing *Powell* v. *Alabama,* 287 U. S. 45; *Avery* v. *Alabama,* 308 U. S. 444, and *Neufield* v. *United States,* 118 F. (2d) 375. We submit that the Circuit Court confused the rule applicable to the review

of Federal convictions with that applicable to State convictions in stressing this question of a fair trial. As this Court pointed out in *Betts* v. *Brady,* 316 U. S. 455, the requirement of the Fourteenth Amendment with regard to due process is not as specific and rigorous as is the command of the Sixth Amendment with regard to representation by counsel. State action amounts to a deprivation of constitutional right only where it is apparent that an unfair trial resulted. The command of the Sixth Amendment, however, is absolute so that a conviction cannot stand where this command has been ignored, regardless of the possible guilt of the defendant or the fairness of the trial. See *Johnson* v. *Zerbst,* 304 U. S. 458.

And in *Glasser* v. *United States,* 315 U. S. 60, this Court reversed the conviction of one of a group of defendants in a Federal court because he was assigned a lawyer also representing a defendant whose situation in the case was hostile to that of the appellant. In that case this Court said:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculation as to the amount of prejudice arising from its denial."

The cases relied upon by the Circuit Court do not, we submit, sustain its conclusion. In the *Powell* case, of course, this Court reversed convictions because of the ineffective representation by counsel. While there are differences between this case and that, both in the nature of the crime and the character of the accused, still the similarities are many. In both cases the trial was distant from the residence of the accused, in both cases assigned counsel had no opportunity properly to confer with the accused, in both cases no witnesses were obtained to support the contention of the accused.

The *Avery* case, on the other hand, was quite different. In the first place, the trial did not begin on the day on which counsel were assigned, but on several days thereafter. In the second place, the trial took place in a rural county where the crime had been committed and where all the witnesses were readily available. In the case at bar the trial took place in Mobile where the alleged crime had not been committed, where none of the witnesses or the accused had ever lived. This Court sustained the conviction in the *Avery* case because it felt that everything possible had been done by assigned counsel. An examination of the record in the case at bar permits no such conclusion, but on the contrary indicates clearly that assigned counsel failed to do many things which he might have done and permitted much evidence to go in which should have been objected to. And, of course, in reaching that conclusion in the *Avery* case this Court was motivated by the fact that it was a State case, so that the due process clause, not the Sixth Amendment, was in question.

The other case cited by the Circuit Court, *Neufield* v. *United States,* 118 F. (2d) 375, is in no way apposite. For in that case one of the defendants had employed a lawyer several months before the trial and this lawyer had assisted counsel assigned to the other defendant.

In contrast with the attitude of the Circuit Court in this case should be set that of the Court of Appeals of New York in *People* v. *McLaughlin,* 291 N. Y. 480. There, as here, the trial took place many months after the indictment. There, as here, the defendant was without counsel when the case was called for trial. Counsel was assigned late in the morning. The trial started at 2 o'clock. The Court of Appeals reversed the conviction so obtained, saying with regard to the right to counsel:

> "This fundamental right is denied to a defendant unless he gets reasonable time and a fair opportunity to secure counsel of his own choosing and with that counsel's assistance, to prepare for trial; no last min-

> ute peremptory assignment of counsel will serve, particularly when made at such a time and under such circumstances as practically to preclude the giving by counsel to prisoner and prisoner to counsel, of effective aid in the preparation of the case."

Other State courts have reached like conclusion in cases not unsimilar. Many of the cases are collected in this Court's opinion in the *Powell* case at page 58. In addition, see *People* v. *Shiffman*, 350 Ill. 243, and *State* v. *Farrell*, 223 N. C. 321.

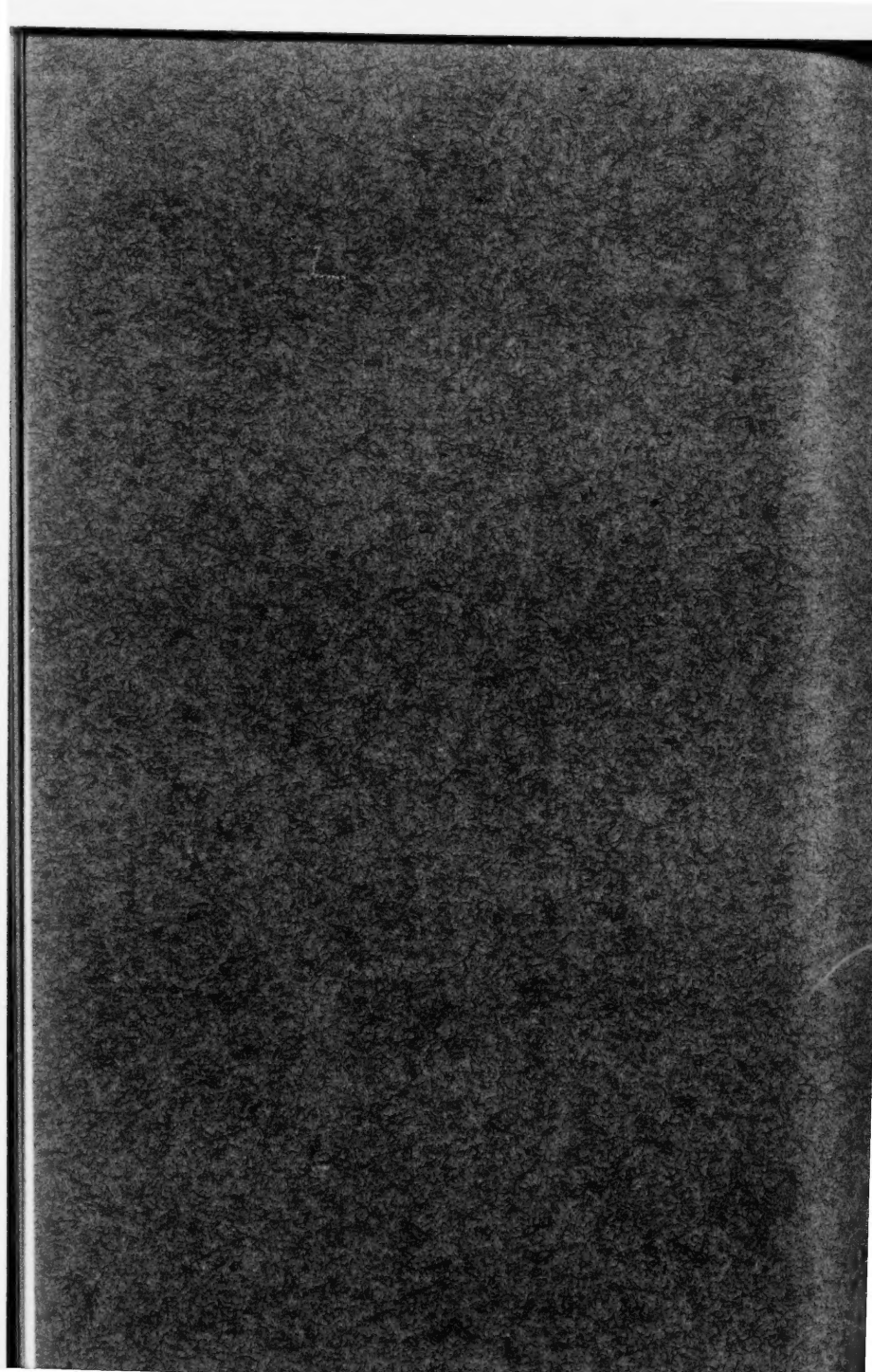
It appears, therefore, that the decision of the Court below is at variance with decisions by this Court and decisions of State courts of last resort on an important question of constitutional right.

CONCLUSION

It is respectfully submitted that this is a case meriting the intervention of this Court and that the writ of certiorari prayed for should be granted.

Respectfully submitted,

OSMOND K. FRAENKEL,
Counsel for Petitioner.



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605588—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 178

JAMES ORVILLE COUCHOIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the circuit court of appeals (R. 93–97) is reported in 142 F. (2d) 1.

JURISDICTION

The judgment of the circuit court of appeals was entered April 22, 1944 (R. 98), and a petition for rehearing was denied May 23, 1944 (R. 101). The petition for a writ of certiorari was filed June 19, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial judge denied petitioner's appointed counsel sufficient time to prepare for his defense, thereby depriving him of adequate representation by counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense.

Section 3 of the Espionage Act of June 15, 1917, as amended (50 U. S. C. 33), provides in pertinent part:

> Whoever, when the United States is at war, * * * shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

STATEMENT

On March 17, 1943, petitioner was indicted in the United States District Court for the Southern District of Alabama on two counts charging violations of Section 3 of the Espionage Act of June 15, 1917, as amended (R. 3–6). Count 1 (R. 3–5) charged that at various times during the period from April 10, 1942, to February 10, 1943, petitioner, while on board the S. S. *West Nohno,* a vessel in the United States Merchant Marine, and while on the high seas, willfully attempted to cause insubordination, disloyalty and refusal of duty in the military and naval forces of the United States by making certain statements, set forth in the count, to specified members of the United States Navy and the crew of the vessel. Count 2 (R. 5–6) charged that petitioner obstructed and attempted to obstruct the recruiting or enlistment service of the United States by the conduct described in Count 1. Petitioner was found guilty by a jury on both counts (R. 8) and was sentenced generally to imprisonment for a term of five years (R. 8–9). Upon appeal to the Circuit Court of Appeals the judgment was affirmed (R. 98), the court finding that the only claim for reversal warranting any detailed consideration was petitioner's contention that he was deprived of adequate representation by counsel because the trial judge denied his motion for a continuance made immediately prior to trial (R. 93–97).

As disclosed by the bill of exceptions and uncontradicted allegations in affidavits annexed to a motion for a new trial, the facts either within the knowledge of the trial judge or of which he was presumably aware when he denied the motion for a continuance made by petitioner's appointed counsel, are:

Shortly after the returning of the indictment on March 17, 1943, petitioner "contacted the clerk of District Court in regard to subpoenaing my witnesses and in regard to making a Pauper's Oath. I was informed by the clerk that the law was that the government would not subpoena witnesses who were distant more than one hundred miles from the court where the defendant took a Pauper's Oath. All of my witnesses were more than one hundred miles from the court" (R. 13). Evidently, they were also beyond the trial district. 28 U. S. C. 656 permits the calling of defense witnesses at Government expense only if they are within the district or within one hundred miles of the place of trial.

During the period prior to trial petitioner engaged in correspondence with the United States Attorney and the district judge "relative to the subpoenaing of my witnesses." The former arranged for the Federal Bureau of Investigation to aid petitioner in locating his witnesses, but he advised petitioner that the Government would not bring his witnesses to Mobile, the place of trial, at the Government's expense (R. 14–15).

When the case was called for trial in June, 1943, petitioner appeared without counsel or witnesses. On the Government's motion, and with petitioner's consent, the case was continued until August 2, 1943. Sometime prior to that date, the United States Attorney having advised petitioner that the Government expected to be ready for trial on that date and that if for any reason petitioner desired a continuance he should write to him or the judge, petitioner wrote to the judge requesting a continuance, the reasons for which do not appear in the record. He was advised that a jury panel had already been subpoenaed and that his request for a continuance could not, therefore, be granted (R. 16).

When the case was called for trial on August 2 "the Court asked the Defendant whether or not he was ready for trial, and whether or not he was represented by counsel." Petitioner stated "that he had received a promise from a source that he could not divulge that witnesses would be present to testify, that he expected counsel to be present, that he did not see any counsel in court and had not seen his witnesses, but that he supposed he was as ready for trial as he ever would be." (R. 31–32.) The court immediately appointed Mr. Sam W. Pipes to represent petitioner. Mr. Pipes made an oral motion that the case be continued "so that he could discuss the case with the defendant and arrange for the attendance of wit-

nesses." "The Court stated that defendant was aware of the day of the trial, that he had written both the Court and the District Attorney in regard to witnesses and had been offered by the Court and the District Attorney their cooperation in securing his witnesses, that the Government's witnesses had been brought to court, that they were Navy men and that the trial could not be postponed at this date." While the trial judge overruled the motion for a continuance, he said that he would give petitioner and his counsel "such time as they might require for the defendant to acquaint counsel with the nature of the case." A jury was then impanelled and the court recessed from 11:30 until 2:30 P. M. At 2:30, when the court reconvened, the judge asked whether the parties were ready for trial; the Government announced that it was, and "the defendant announced that he was ready." The case accordingly proceeded to trial (R. 32). At no time during the five-day period the trial lasted did petitioner express any dissatisfaction with his counsel or with the manner in which counsel was conducting his defense, nor was any request made for additional time to secure the attendance of witnesses or to make other preparation for petitioner's defense (R. 33–85).

Without reciting the evidence at the trial in detail, since, of course, the guilt or innocence of petitioner is not the question involved, suffice it to say that the bill of exceptions contains (R. 33–60)

the testimony of a number of members of the naval armed guard and a member of the merchant crew of the S. S. *West Nohno* as to various utterances made by the petitioner to them, during a 9-months' cruise of the vessel, criticising the participation of this country in the war and contrasting the better pay and conditions of those who were merchant seamen with those who were on the same vessels as naval personnel (see, *e. g.*, R. 33–41, 53, 54, 58). There was also testimony that these statements caused disaffection in the armed guard (see, *e. g.*, R. 34, 37, 43, 46–47). Each of the Government's witnesses was subjected to cross-examination by petitioner's counsel (see, *e. g.*, R. 34, 36, 38, 40, 41, 43, 45, 48, 55, 59, 85). Petitioner's defense consisted, in addition to his own testimony, of a stipulation that, if present, six named members of the merchant crew would have testified in substance that they did not hear petitioner make any of the statements set out in the indictment (R. 60–62). In his own behalf petitioner testified fully concerning his activities on the S. S. *West Nohno*. In respect of the statements attributed to him by witnesses called on behalf of the Government, he denied making some and claimed that others were parts of conversations related out of context, and he further testified that he never attempted in any way to create insubordination or disloyalty among any members of the

armed guard or to discourage anyone from enlisting in the Navy (R. 65–80).

After the jury returned its verdict of guilty and petitioner had been sentenced, petitioner's appointed counsel filed a motion for a new trial which, in addition to alleging that the trial court had erred in overruling his objections to certain questions and that the verdict was not supported by substantial evidence and was contrary to the weight of all of the evidence, also alleged that the court committed error in denying his motion for a continuance at the beginning of the trial, and that petitioner had been deprived of a fair trial because he did not have an opportunity properly to prepare and present his case and because his witnesses were not present to testify (R. 9–10). In support of the latter allegations counsel annexed to the motion affidavits by petitioner and himself. In addition to facts which have heretofore been set forth, petitioner's affidavit (R. 11–17) recited his efforts, without success, to obtain counsel and assistance in securing the attendance of witnesses through the National Maritime Union and other organizations. He also claimed that there were "many facts and circumstances relating to the charge for which I was tried that I was not able to convey to my court-appointed attorney and there were many facts that I feel should have been brought out on the trial that were not brought out." The affidavit of the attorney (R. 17–20)

recited the circumstances of his appointment to represent petitioner, his unfamiliarity with sedition cases, his efforts to familiarize himself with the case, particularly through a conference which he had with petitioner at the noon recess on August 2, the difficulties arising because of his inability to obtain and confer with witnesses and his unawareness of various facts and circumstances which were brought out at the trial but had not been disclosed to him by petitioner. After hearing arguments by the United States Attorney and petitioner's appointed counsel, the court denied the motion for a new trial (R. 23–24). Thereupon petitioner's appointed counsel took an appeal, drafting the necessary papers (R. 24–28, 87–90), and prepared and settled a bill of exceptions (R. 86).[1] In the Circuit Court of Appeals the case was handled by other counsel (R. 93).

ARGUMENT

The gravamen of petitioner's complaint is that his appointed counsel was not given sufficient opportunity to prepare for his defense but was forced into an immediate trial (Pet. 4–5). There is, we submit, no basis in the record for this contention.

1. The case did not finally come on for trial until, after one resetting, a period of over four

[1] The petition for a writ of certiorari indicates that this task was undertaken without the aid of a stenographic transcript (Pet. 13).

months had elapsed from the date the indictment was returned. Petitioner had previously been advised by the trial judge that a continuance could not be had as a jury panel had already been subpoenaed. Yet he appeared on the scheduled trial date without counsel or witnesses. He gave no explanation to the trial judge for their absence other than that he expected them to be present. Indeed, he stated to the trial judge that he could not divulge the source of a promise that he had received that witnesses would be present to testify and concluded by saying that "he supposed he was as ready for trial as he ever would be" (R. 31–32). Obviously there was not in these statements anything which warranted the trial judge in believing that counsel or witnesses would soon, if ever, be available; indeed, the fair inference was that petitioner was without hope of receiving such aid. Moreover, so far as witnesses were concerned, it is fair to assume that the trial judge, as well as the United States Attorney, knew that although both had offered their cooperation in securing witnesses for him, petitioner was himself financially unable to bring them to Mobile[2] where the trial was required to be held.[3] It was

[2] As indicated in the Statement, *supra*, p. 4, petitioner had been in correspondence with both the United States Attorney and the trial judge "relative to the subpoenaing of my witnesses."

[3] The offenses were alleged to have been committed on the high seas (R. 4, 5) and petitioner first reentered this country at the Port of Mobile (R. 83). 28 U. S. C. 102 provides

also apparent that the Government could not bear the expense of having the witnesses brought to Mobile because of a statutory prohibition.

On the day the trial was scheduled to begin the Government had, however, assembled members of the naval armed guard as witnesses. It was essential that they be returned to their posts of duty as expeditiously as possible. In addition, a jury panel had been subpoenaed for the trial and the prospective jurors were present in the courtroom waiting to be called.

In the face of this situation and the quite definite indication by petitioner that he was without hope of securing expected legal assistance or of obtaining witnesses through the aid of an unrevealed benefactor, the question which presents itself is whether an abuse of judicial discretion resulted from the action which the trial judge took to accommodate the conflicting interests. We submit that he took the only course that was reasonably open to him. He immediately appointed counsel to represent petitioner. Counsel naturally sought a continuance so that he could discuss the case with the defendant. But he also sought a continuance upon the further ground that he desired to "arrange for the attendance

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that "The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought."

of witnesses." He explains in his affidavit in support of the motion for a new trial that petitioner "stated that he had the names of several witnesses who were not present that he desired to testify in his behalf" (R. 18). These witnesses were obviously more than one hundred miles from the place of trial or they would have been brought in at Government expense, and even if they had been obtainable, negotiations for their presence would necessarily consume considerable time. It is evident, therefore, that what counsel was seeking was not a mere temporary postponement of the trial but a postponement of some considerable duration. The trial judge would not have been justified in granting any such adjournment in the face of the considerations which called for a prompt trial, as contrasted with the hopelessness manifested by petitioner of ever obtaining from an outside source the necessary financial assistance to secure witnesses and the judge's prior knowledge that petitioner was unable, himself, to bear this expense. There is certainly no basis, therefore, for any contention that the trial judge abused his discretion in refusing a continuance of the character sought. But the trial judge did not entirely shut the door on counsel's motion. Counsel, having been just appointed, was of course, entitled to a reasonable time to familiarize himself with the case. The court ac-

cordingly stated that "he would give defendant and his counsel such time as they might require for the defendant to acquaint counsel with the nature of the case" and, after striking the jury, declared a recess from 11:30 until 2:30 (R. 32). This apparently was satisfactory to petitioner and his counsel since neither made any objection. When the court reconvened at 2:30 the defendant was asked by the trial judge whether he was ready for trial and he announced that he was. Certainly, if petitioner had not fully informed counsel of the relevant facts of the case, and more time was necessary, that was the time for him or his counsel to speak. Instead, petitioner stated that he was ready for trial. In these circumstances no reason appeared why the court should not proceed with the trial of the case. It is evident, therefore, that there is no support for the charge that petitioner was forced to "an immediate trial" without giving his counsel opportunity to familiarize himself with the case.

2. Much of the petition for a writ of certiorari is devoted to a criticism of the way petitioner's appointed counsel handled the case (Pet. 10–13), but it is significant that at no stage of the trial did petitioner protest that his interests were not being adequately protected, although the record discloses that he was, evidently, a man of some education, intelligent, and aggressive. At the trial petitioner was characterized by the command-

ing officer of the naval armed guard aboard the *West Nohno* as "an intelligent man * * * trained in debate and logic" (R. 51). The draft of a contract which he prepared for submission to the commanding officer of the armed guard confirms this characterization (see R. 70–74). Petitioner was the official union representative of the merchant crew in its relations with the ship's commanding officer (R. 45, 52, 65, 67). In the performance of his duties in that capacity he proved himself to be a skilled and alert representative who was familiar with union rules and relevant War Shipping Administration Orders (see *e. g.*, R. 36, 37, 42–43, 44, 48, 52, 53, 56, 58, 67, 68). Additionally, the affidavit he filed in support of his motion for a new trial (R. 11–16), in detailing his actions prior to trial in seeking legal aid through his union and other agencies and in attempting to secure the presence of desired witnesses at his trial, reveals a course of conduct which indicates that petitioner was quite aware of his legal rights and of what was necessary to protect them.

Specifically, it is asserted that appointed counsel should have objected to certain testimony (Pet. 10) and that he should have moved for a directed verdict (Pet. 11–12). Aside from the fact that, petitioner indicates (Pet. 13), the record was made up from memory and not on the basis of a stenographic transcript and hence may not reflect all that took place at the trial, it is clear, of

course, that such a complaint could not prevail if, as the Circuit Court of Appeals pointed out, petitioner had had counsel of his own choosing; there must be an end to litigation sometime. Certainly, the test in determining whether an indigent defendant has been afforded adequate legal representation cannot be that some other attorney might have proceeded differently, when the case is viewed in retrospect. It is sometimes better trial strategy to forego frequent objections and exceptions to evidence and concentrate on convincing the jury that the defendant is innocent and should be acquitted than it is to attempt to build up an appellate record which may eventuate in a reversal but require a new trial. If there was any fundamental error in the admission of evidence, appellate counsel could, of course, have urged it under the "clear error" doctrine despite the failure of appointed counsel to object. While, so far as appears from the record, no motion for a directed verdict was made, the pivotal issue which evolved was whether the jury should believe the testimony of the Government witnesses or that of the defendant,[4] and of course it must

[4] The Circuit Court of Appeals, after examining the record, stated that "the record does not at all support the claim made that it is clear that a verdict for defendant was demanded." Since petitioner was sentenced generally to five years' imprisonment, a valid conviction under either of the two counts would sustain his conviction. *Hirabayashi* v. *United States*, 320 U. S. 81, 85.

be assumed that the case was submitted to the jury on correct legal principles, since the charge is not incorporated in the record.[5]

When the record is viewed as a whole it is clear, we submit, that petitioner's counsel performed his "full duty intelligently and well", which is all that is required of appointed counsel. Cf. *Avery* v. *Alabama,* 308 U. S. 444, 450. We have recited in detail (*supra,* pp. 5–9), from the beginning of the trial right through to the taking of an appeal, the steps petitioner's counsel took to safeguard his interests. His task was rendered particularly difficult because of petitioner's inability to pay the costs of bringing his witnesses to Mobile from various parts of the country. But he secured the best posssible substitute for oral testimony of the witnesses. He obtained from the United States Attorney a stipulation (R. 60–62) as to the testimony six members of the merchant crew of the *West Nohno* would have given had they been present, and this stipulation was introduced as a part of petitioner's defense, although the proffered testimony had not, of course, been subjected to the scrutiny of cross-examination. In summary, in a situation necessarily difficult because of factors beyond the control of anyone,

[5] Cf. *Hall* v. *United States*, 48 F. (2d) 66, 68 (C. C. A. 9); *Kanner* v. *United States*, 34 F. (2d) 863, 867 (C. C. A. 7); *Brown* v. *United States*, 32 F. (2d) 953, 954 (App. D. C.); *Harrod* v. *United States*, 29 F. (2d) 454, 455 (App. D. C.).

appointed counsel did as well in safeguarding petitioner's interests as reasonably could have been expected.

3. Petitioner's motion for a new trial and supporting affidavits did not in any wise alter the basic picture (R. 12–22). Indeed, the affidavit of petitioner makes it quite apparent that, as he indicated at the beginning of the trial, he had little, if any, basis for hoping that he would receive from a source which he refused to reveal either legal assistance or financial aid in procuring witnesses (see R. 13, 14, 16). The court did not abuse its discretion in denying the motion for a new trial. The reasons which justified it in refusing to authorize a prolonged delay of the trial amply supported its overruling of the motion for a new trial.

4. The cases upon which petitioner relies (Pet. 13–16) are factually dissimilar from the present case. In none of them did it appear, as here, (1) that it was unlikely that the defendant would be able to procure witnesses for his defense regardless of the length of time that trial was delayed, or (2) that the trial judge allowed appointed counsel to take such time as he needed to familiarize himself with the case, or (3) that the defendant consented to the commencement of the trial by advising the court that he was ready for trial.

CONCLUSION

There is no basis on the present record for the contention that the trial court failed adequately to provide petitioner with representation by counsel. We, therefore, respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
W. MARVIN SMITH,
Special Assistants to the Attorney General.
IRVING S. SHAPIRO,
Attorney.

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